IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE HUDSON COMPANY, INC., Respondent, v. JAMES A. RYFFEL and LINDA B. RYFFEL, husband and wife and the marital community composed thereof; and RYFFEL FAMILY SPRINGRIDGE LP, a foreign entity, Appellants.	No. 37403-0-II UNPUBLISHED OPINION

Houghton, P.J. — After entering a $24,805 principal judgment, the trial court awarded $89,397 attorney fees in a lien foreclosure action. James and Linda Ryffel appeal, arguing that the trial court abused its discretion in calculating the lodestar rate, the hours worked, and in setting a multiplier. We agree and reverse and remand for recalculation of the attorney fee award.

FACTS

In February 2006, the Ryffels hired a general contractor, The Hudson Company, Inc., to perform remodeling work on their Bainbridge Island older log home, located in Kitsap County.[1] The contract called for payment, part on a fixed price basis and part on a "time and materials" basis plus a 15 percent profit. Clerk's Papers (CP) at 132. The contract also called for mediation and possible binding arbitration, with each party bearing its own costs.

[1] The Ryffel Family Springridge LP, a family trust, holds title to the log home.

On July 25, after a payment dispute, Hudson commenced a lien foreclosure action in the superior court against the Ryffels. A Seattle solo practitioner represented Hudson at trial. Among its claims, Hudson requested attorney fees.

At the conclusion of trial, the trial court ruled largely for Hudson, but it reduced the requested charges by $500. It entered a judgment for $24,805.00, plus $6,899.19 contract interest and $445.05 costs.

At a hearing on the attorney fees award, Hudson's counsel proposed a $350 per hour rate for purposes of calculating his attorney fees. The Ryffels submitted declarations from four Kitsap County attorneys stating that hourly rates for construction lien claims in Kitsap County ranged between $200 and $250 and one saying that rates above $260 would be unreasonable.

The trial court awarded attorney fees based on statutory and contractual grounds. It found Hudson's counsel's hourly rate of $350 to be reasonable and set it as the lodestar. But it reduced the number of hours from 194.75 to 170.28. The trial court applied a 1.5 multiplier to the lodestar and awarded $89,397 attorney fees on the $24,850 lien foreclosure judgment.

The Ryffels appeal the trial court's attorney fee calculation.

ANALYSIS

Lodestar Analysis

The Ryffels contend that the trial court abused its discretion by awarding an unreasonable attorney fee. They challenge the reasonableness of the hourly rate, the number of hours, and the 1.5 multiplier.

Washington courts generally follow the American Rule, whereby each party in a civil

matter pays its own attorney fees and costs. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296, 149 P.3d 666 (2006). But trial courts may award attorney fees where authorized by "contract, statute, or a recognized ground in equity." *Cosmopolitan*, 159 Wn.2d at 297. Here, Hudson substantially prevailed,[2] and the trial court based its attorney fee award on RCW 60.04.181(3),[3] RCW 18.27.040(6),[4] and a provision in the contract.[5]

When authorized to award attorney fees, trial courts have broad discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 214, 165 P.3d 1271 (2007).

Washington courts generally use the lodestar method to determine an attorney fee award.

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[2] A party prevails when it receives a judgment in its favor. *Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 521, 145 P.3d 371 (2006). If neither party wholly prevails, then the prevailing party is the one who substantially prevails, which depends on the relief afforded the parties. *Scoccolo*, 158 Wn.2d at 521.

[3] RCW 60.04.181(3) (mechanics' and materialmen's liens) states in part:

> The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable.

[4] Under RCW 18.27.040(6) (contractor's bonds), "[t]he prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees." This statute was amended in 2007 and does not affect our analysis. For purposes of this opinion, we refer to the current version.

[5] The contract provides, in pertinent part: "As long as Owner makes all payments required under this Agreement, Contractor shall claim no lien against Premises. In the event of default and payment is not made within three (3) days, owner will pay all costs of collection including attorney fees." Ex. 1, at 6, ¶ 11.

Mahler, 135 Wn.2d at 433. To calculate the lodestar figure, the trial court multiplies the number of hours reasonably expended on the matter by a reasonable hourly rate. *Mahler*, 135 Wn.2d at 434. The calculation may not include duplicative or wasteful hours. *Mahler*, 135 Wn.2d at 434.

The trial court may supplement its lodestar determination using the factors listed in former RPC 1.5(a) (2005).[6] *Mahler*, 135 Wn.2d at 433 n.20. One such factor is "[t]he fee customarily charged in the locality for similar legal services." Former RPC 1.5(a)(3). No single factor is determinative. *See Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 774, 115 P.3d 349 (2005). In rare instances, a trial court may adjust the lodestar figure upward or downward. *Mahler*, 135 Wn.2d at 434. We will reverse an attorney fee award where the trial court used an improper method to calculate the attorney fee award.[7] *Seattle-First Nat'l Bank v. Wash. Ins.*

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[6] Former RPC 1.5(a) lists the following factors to determine reasonable attorney fees:

> (1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) The fee customarily charged in the locality for similar legal services;
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> (4) The amount involved in the matter on which legal services are rendered and the results obtained;
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> (5) The time limitations imposed by the client or by the circumstances;
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> (6) The nature and length of the professional relationship with the client;
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> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

Hudson chooses to compare each of these factors to the present case but because they are discretionary, we only review those factors used by the trial court.

"We do not apply the Rules of Professional Responsibility retroactively." *First Small Bus. Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 336, 738 P.2d 263 (1987).

Guar. Ass'n, 94 Wn. App. 744, 762, 972 P.2d 1282 (1999).

A. Hourly Rate

The Ryffels make several arguments regarding the trial court's decision to use $350 per hour as the reasonable rate under the lodestar analysis. We address each in turn.

1. Unspecified Hourly Contingent Rates Not Permitted for Lodestar Analysis

The Ryffels first argue that the trial court abused its discretion by accepting Hudson's counsel's rate of $350 per hour. They assert that this was improper where there was no formal agreement, written or unwritten, on the terms of his representation, other than an oral contingent fee arrangement to "do what's fair at the end." Appellant's Br. at 18-19.

Hudson's counsel explained this arrangement as follows:

> I would expect nothing from [Mr. Hudson] [if I were unsuccessful in getting a recovery]. I would send him no bill for my time whatsoever. I would request that he pay my out-of-pocket costs, which he does, and that would be that.
>
> The arrangements with all of my contingent fee cases—and a great part of my practice is contingent fee—is to have a fee agreement and then look at the end and see if that fee is still reasonable under all of the circumstances. And that's exactly what I do and I have done with Mr. Hudson for now several cases.

RP (Feb. 1, 2008) at 12-13. Describing his relationship to his client, counsel said, "I have known this man since he came to Bainbridge Island. My children grew up [with] his children. We know each other very well. I sail with him occasionally." RP (Feb. 1, 2008) at 49.

[7] We note at the outset that the trial court's findings of fact and conclusions of law here briefly and summarily grant $89,397 attorney fees, with only a caveat that further explanation may be found in its oral decisions of December 10, 2007, and February 8, 2008. Were we not reversing on other grounds, we could reverse and remand for this reason alone. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000).

As for the rate itself, he stated:

> [Three hundred fifty dollars per] hour is my standard billing rate. I have billed this to national clients, I have billed it to people who pay with after-tax dollars that don't get the benefit of deducting them. That is my standard hourly rate. I have been awarded that rate I believe in another of Mr. Hudson's cases that went to the Court of Appeals. The court commissioner, Division II, awarded to the minute every single moment that I billed at $350 per hour. It's *The Hudson Company vs. King* [noted at 140 Wn. App. 1024, 2007 WL 2482150].[8]

RP (Feb. 1, 2008) at 8-9. At oral argument before this court, Hudson's counsel admitted that his standard agreement is to take one-third of the total recovery, including the principal, interest, and attorney fee award. Accordingly, his share of roughly $120,000 was $40,000, despite a court-awarded attorney fee award of nearly $90,000. The client, Hudson, would keep more than $80,000 on a dispute wherein the total principal judgment and interest amounted to $31,704.19.

The Ryffels argue that this indeterminate fee agreement runs afoul of the ethical requirement that contingent fee agreements be reduced to writing and thus "affects the court's determination of a reasonable lodestar fee under RPC 1.5(a)." Appellant's Br. at 20. Former RPC 1.5(c)(1) states that "[a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal." The Ryffels also contend that Hudson's arrangement violates former RPC 5.4(a) (2005) because "[a] lawyer or law firm shall not share legal fees with a nonlawyer," except in limited situations that do not apply here.

Neither party cites, nor could we find, any Washington authority clarifying whether the

[8] But Hudson's counsel submitted a supplemental declaration a few days later acknowledging that his hourly rate for the *King* case was actually $300, his prior rate.

trial court may base its lodestar analysis on the prevailing party's unwritten and unspecified fee agreement. We may look to former RPC 1.5(a) for guidance on the reasonableness of hourly rates, and one such factor involves "the terms of the fee agreement between the lawyer and client." Former RPC 1.5(a)(1). Although these factors are discretionary, this language clearly suggests a threshold requirement that contingent fee agreements have some cognizable terms. *See* former RPC 1.5(a)(1). The only terms before the trial court involved "do[ing] what's fair at the end," but we now know that this vague language means splitting attorney fees with his client. RP (Feb. 1, 2008) at 12. Hudson's counsel may bill $350 per hour to some "national clients," but the record does not indicate whether he has ever charged this rate to Hudson, his friend of many years.[9] RP (Feb. 1, 2008) at 8.

Faced with these circumstances, a trial court cannot accept counsel's bare assertion that he or she has billed some clients at a high rate and that that rate is appropriate—under an unwritten and unspecified contingent fee agreement—to extract fees from the losing party. After all, "the party seeking fees bears the burden of proving the reasonableness of the fees," especially the hourly rate, which literally multiplies the cost of litigation. *Mahler*, 135 Wn.2d at 434.

Although the trial court considered a number of other factors to determine counsel's lodestar rate—including the lengthy attorney-client relationship, counsel's extensive experience and ability, and the near-perfect results obtained, albeit on a principal judgment of $24,805—the trial court must nevertheless take an "*active* role in assessing the reasonableness of fee awards."

[9] By way of comparison, the legislature set reasonable attorney fees at no more than $150 per hour for parties who prevail in a judicial review of an agency action, unless a court concludes that special factors justify a higher rate. RCW 4.84.340(3); RCW 4.84.350(1).

Mahler, 135 Wn.2d at 434. Therefore, we hold that the trial court's failure to make a reasonable determination abused its discretion in determining the lodestar here.

2. Higher Degree of Talent Was Not Required

In articulating its rationale for awarding attorney fees, the trial court said, without further elaboration, "[W]hile certain events are handled exclusively within a market of this county, this kind of suit and litigation is really—a much broader degree of talent is required." RP (Feb. 8, 2008) at 59. The Ryffels challenge the trial court's reasoning, arguing that "[n]othing in this record suggests that this case demanded a particular 'degree of talent,' and the trial court did not and could not find that competent local counsel was unavailable to handle this garden-variety contract claim in Kitsap County." Appellant's Br. at 16. We agree.

Again, we may look to former RPC 1.5(a) for guidance on reasonableness, including "[t]he time and labor required, the novelty and difficulty of the questions involved, [and] the skill requisite to perform the legal service properly." Former RPC 1.5(a)(1). Although Hudson now contends that "[t]he primary issue of defining 'time' in the time and materials section of the contract work was somewhat novel," his opening statement at trial began, "This is [a] very straightforward lien foreclosure case." Resp't's Br. at 10; RP (Dec. 4, 2007) at 31. Run-of-the-mill contract disputes, even ones involving ambiguous contracts, as is true here, do not require specialized out-of-town counsel.[10] This is merely one of the former RPC 1.5(a) factors relied on

[10] Hudson further argues that "[t]he cumulative impact of the wide-ranging defenses added to the difficulty of the case. The Ryffels claimed violations of the Consumer Protection Act that [Hudson's] conduct was fraudulent, that the lien was frivolous, and so on." Resp't's Br. at 11. Even so, our courts set a higher bar for truly novel and difficult cases.

at trial, but to that extent, the trial court abused its discretion.

3. Locality Was Not Limited to Kitsap County

The Ryffels next argue that the trial court abused its discretion in choosing an hourly rate of $350 because that rate is not based on the reasonable hourly rates prevailing in the locality, which they argue is Kitsap County. They contend that we should adopt the federal standard and cite *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997), for the proposition that "the relevant community is the forum in which the district court sits."[11] Appellant's Br. at 15.

We need not adopt the federal standard. In Washington, one of the relevant factors is "[t]he fee customarily charged in the locality for similar legal services." Former RPC 1.5(a)(3). Although the trial court may consider opposing counsel's rate, we do not require equivalence. *See Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). In fact, a trial court abuses its discretion when it arbitrarily sets the hourly rate at the prevailing local rate to determine an attorney fee award. *Crest*, 128 Wn. App. at 773-74. In *Crest*, Division One remanded for a trial court to explain on the record why it limited the hourly rate to that customarily charged in Whatcom County. 128 Wn. App. at 773-74.

Here, the trial court ruled that

> $350 an hour is not excessive for the locality. I am not restricting this to the locality of Bremerton, Tacoma, or Seattle. I believe the entire Puget Sound area has a rich exchange of lawyers, and that while certain events are handled exclusively within a market of this county, this kind of suit and litigation is really —a much broader degree of talent is required.

[11] The Ryffels furthermore contend that *Mahler* requires the trial court to base an attorney fee award on the market rates for the relevant community, but Hudson correctly points out that the court instead permitted trial courts to supplement their lodestar analysis with former RPC 1.5(a) factors. 135 Wn.2d at 433 n.20.

RP (Feb. 8, 2008) at 59. Accordingly, declarations that the Ryffels' counsel charged $200 per hour and that $260 per hour is the most any Kitsap attorney would charge for this type of construction contract case, although relevant, do not lead us to decide that the trial court abused its discretion by failing to limit the locality to Kitsap County.[12]

B. Travel Time

The Ryffels further contend that the trial court abused its discretion by including an unreasonable number of travel hours by Hudson's counsel. Specifically, they assert that the trial court should not have awarded attorney fees for ferry travel time between Seattle and Kitsap County.

Adopting out-of-state case law, Division Three held that travel time is generally not compensable in the lodestar analysis, except when the trial court awarded attorney fees as a sanction for causing travel to attend unnecessary discovery hearings. *Roberson v. Perez*, 123 Wn. App. 320, 346-47, 96 P.3d 420 (2004). Although dealing with an analogous issue, our Supreme Court discussed with approval *Roberson*'s travel time analysis in *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 691-92, 132 P.3d 115 (2006).

Here, nothing in the record suggests that trial court rule included travel time as a sanction for the Ryffels' misconduct. Thus, the trial court based its award on an untenable ground and abused its discretion by including travel time.

[12] The dissent notes that other skilled legal professionals in this region may charge more or less than Hudson's counsel's $350 hourly rate. Dissent at 19. We agree and conclude that the trial court properly considered hourly rates from across the Puget Sound area. We cannot support, however, the trial court's decision to apply counsel's standard rate without requiring counsel to prove that it is reasonable under these circumstances.

C. Lodestar Multiplier

Last, the Ryffels argue that the trial court abused its discretion because a downward adjustment is warranted where, as here, an attorney fee award exceeds the judgment by a factor of 3.5. The Ryffels also argue that neither the quality of Hudson's counsel nor the contingent nature of his representation required a multiplier. Hudson contends that the trial court adequately articulated that the multiplier was appropriate given the contingent nature of the payment.

Once a lodestar has been calculated, we may consider an award adjustment reflecting additional factors. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007). A trial court may make adjustments based on "'two broad categories: the contingent nature of success, and the quality of work performed.'" *Chuong Van Pham*, 159 Wn.2d at 541 (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983)).

"The contingency adjustment is based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services, unless they can receive a premium for taking that risk." *Chuong Van Pham*, 159 Wn.2d at 541. "While we presume that the lodestar represents a reasonable fee, occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case." *Chuong Van Pham*, 159 Wn.2d at 542. The *Bowers* court explained,

> In adjusting the lodestar to account for this risk factor, the trial court must assess the likelihood of success at the outset of the litigation. This is necessarily an imprecise calculation and must largely be a matter of the trial court's discretion. Nevertheless, certain guiding principles should be followed. . . . [T]he risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case. Moreover, to the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made. Finally, the risk factor should be applied only to time

> expended before recovery is assured; for example, time expended in obtaining the fees themselves should not be adjusted.
>
> The second basis on which the lodestar might be adjusted is to reflect the quality of work performed. This is an extremely limited basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate.

100 Wn.2d at 598-99. The trial court's lodestar figure may "in rare instances, be adjusted upward or downward in the trial court's discretion." *Mahler*, 135 Wn.2d at 434.

The Ryffels rely on *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993), to support their argument that a downward adjustment is appropriate here. In *Fetzer*, our Supreme Court considered "a run-of-the-mill commercial dispute" involving 120 vacuum cleaners. 122 Wn.2d at 156. The defendant, who prevailed on his motion to dismiss for lack of jurisdiction, requested attorney fees of $180,914 and received a reduced $116,788. *Fetzer*, 122 Wn.2d at 143. Our Supreme Court reversed this excessive award and remanded for calculation in line with the lodestar method. *See Fetzer*, 122 Wn.2d at 143. Although the trial court reduced the fee award to $72,746.38, our Supreme Court reversed for a second time because the "sum [was] patently unreasonable" in light of the issues involved and the $19,000 at stake. *Fetzer*, 122 Wn.2d at 143, 150, 152. "[A] lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment." *Fetzer*, 122 Wn.2d at 150. But "[w]e will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small." *Mahler*, 135 Wn.2d at 433.

Here, Hudson's counsel requested a total of 194.75 hours. Before applying the risk multiplier, the trial court reduced these hours by 10 percent to 175.28 because counsel collected a partial judgment and billed one-tenth hours for activities such as e-mailing. The trial court then

subtracted another 5 hours from the time allotted to foreclose the lien and arrived at a total of 170.28 hours. But on January 4, 2008, after trial ended, Hudson's counsel submitted billing records totaling 178.75 hours. Thus, the 194.75 hour figure included counsel's time spent seeking attorney fees, contrary to the rule that the trial court only include counsel's time "expended before recovery is assured." *Bowers*, 100 Wn.2d at 599; *see* RP (Feb. 1, 2008) at 15 (Counsel said that his total hours were 178, "[p]lus six hours associated with today's efforts, getting ready for today and coming over here, and ten more hours in the future to foreclose."). Accordingly, the trial court abused its discretion, and we remand for it to apply the multiplier "only to time expended before recovery is assured." *Bowers*, 100 Wn.2d at 599.

As for the multiplier itself, the trial court decided to employ it based on the following:

> [T]he reasons that a multiplier would be allowed under this particular case is, one, the degree of under-oath representation about [Hudson's counsel's] practice, the extent of which he has been involved in the bar, the bar exams that are occurring, the seminars that are given. I do not doubt his representation concerning the contingent nature of the work. And I also see that the hourly rate or the number of hours could have never been sustained under the mere recovery itself. Consequently, in large part, it's dependent upon your recovery, upon the nature of the attorney fee award, and I think that any lawyer that's going to take a risk of that type in this world is entitled under the nature of this particular case because of the Court's conclusion that means for alternate dispute resolution was pulled away from by the [Ryffels]. I have also, even though it was stipulated both at the time of trial, I found that it was pulled away by the [Ryffels] in the beginning. And, more importantly, as [Mr. Ryffel] said on the witness stand, he felt this was not about money. All the lawyers here understand they don't practice their practice unless there's a consideration of money.

RP (Feb. 8, 2008) at 62. But the trial court entered finding of fact 1.30 stating, "The parties waived Paragraph 9 of the parties' contract which provided for alternative dispute resolution opportunities." CP at 124. We address these reasons in turn.

First, the quality of counsel's work is an "extremely limited basis for adjustment." *Bowers*, 100 Wn.2d at 599. This is true because we generally expect counsel with more experience to charge a higher hourly rate. *Bowers*, 100 Wn.2d at 599. At $350 per hour, such was certainly the case here. The trial court did not adequately explain how counsel's representation was so extraordinary that it would qualify under such a narrow standard. Ordinarily, we would remand for explanation for that reason alone; nevertheless, we reviewed the record and hold that, although counsel provided quality representation for his client, it did not and will not warrant a 50 percent bonus.

Second, Hudson's counsel asserts that he represented Hudson on an unwritten and unspecified contingent basis. The trial court correctly points out that hourly billing would never make economic sense when litigating such a small dispute. Although this arrangement appears to violate former RPC 1.5(c), a contingent representation would indeed militate in favor of an upward adjustment of attorney fees. But there is no written contingent fee agreement to support the upward adjustment here.

Finally, the trial court chose an upward adjustment based on the impermissible reasons that the Ryffels waived alternative dispute resolution called for in the contract and James Ryffel's testimony explaining his decision to litigate.[13] Hudson does not cite, and we cannot find, any

[13] James Ryffel testified,

> It's not about the money. [Twenty-five thousand dollars] doesn't change my life one way or another. It's—I feel like my wife has been violated, my family has been violated. This is my home. I don't think it's right that you can deceive and withhold information, have hidden profits in a transaction, just because somebody is from out of town. . . . Maybe if it was a business deal, I would just write it off and forget about it, but this is my home and [Hudson] treated my wife unfairly and he lied about it and his partner lied. And I just—I just don't want to be treated

authority to support these as reasons to multiply an attorney fee award.

At oral argument, Hudson's counsel argued that our recent case of *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008), bolstered the trial court's decision to apply a multiplier for his attorney fee award. We disagree.

Broyles involved an appeal by three female attorneys formerly employed as deputy prosecutors, who filed employment discrimination actions against Thurston County, alleging hostile work environment and retaliation. 147 Wn. App. at 415-22. We held that the trial court's decision to apply a multiplier was not an abuse of its discretion, based on its findings "assessing the risk to the firm and in assessing the necessary skill level for taking such a case on a contingency basis."[14] *Broyles*, 147 Wn. App. at 453.

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like that.
RP (Dec. 6, 2007) at 381-82.

[14] We based our assessment in *Broyles* on the following findings of fact:

> 9. Multiplier. The claims involved in this lawsuit required a great deal of lawyer and staff time to pursue them, due to the novelty and difficulty of the claims and the vigorous defense. Undertaking this representation significantly impacted the ability of the lead lawyers to work on other matters and constituted a significant risk to Plaintiffs' law firm if it did not recover fees. This case was unique, involving complex issues of employment law and governmental liability. From the beginning this was an exceptional case that presented an exceptional challenge for Plaintiffs' counsel. This case required a high level of skill in the specialized area of employment law involving governmental entities as well as a high level of skill in trial preparation and trial presentation. This case was taken on a contingency basis and involved substantial risk of no recovery. Few law firms in the Puget Sound region are equipped to take these kinds of risks on behalf of a client. Although the recovery was substantial, at the time of accepting the case it was a significant risk.
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> 10. The experience, reputation and abilities of the lawyers representing Plaintiffs were of a very high caliber and the lawyers were skilled. I find that Plaintiffs' counsel provided exceptional representation in this case.
>
> 11. In light of the substantial risk and the quality of representation, the

Although Hudson's counsel correctly argues that trial courts may adjust attorney fee awards based on either a contingency agreement or the quality of work performed, *Broyles* recites established precedent, so his reliance on this case is unnecessary. What he fails to explain is how this case constitutes one of those "rare instances" that the *Mahler* court envisioned deserved an upward or downward adjustment. 135 Wn.2d at 434.

Moreover, we can distinguish the present case from *Broyles* on the facts of the contingency. First, the trial court in *Broyles* applied a multiplier because the plaintiffs' counsel far exceeded the standard: Not only was *Broyles* taken as contingent work, but also it "involved substantial risk of no recovery" and "was an exceptional case that presented an exceptional challenge for Plaintiffs' counsel." 147 Wn. App. at 449. It "required a high level of skill in the specialized area of employment law involving governmental entities as well as a high level of skill in trial preparation and trial presentation." 147 Wn. App. at 449. The same cannot really be said for counsel's chances of recovery or specialized skills in this case.

Second, the *Broyles* plaintiffs required multiple lawyers working on contingency, whereas counsel here handled the case alone. 141 Wn. App. at 447. Third, although Hudson and its counsel never reduced their contingent fee agreement to writing—or even concrete terms—nothing in *Broyles* suggested the same arrangement. Finally, unlike here, nothing in *Broyles* suggested that plaintiffs' counsel would be splitting their attorney fees with their clients.

Therefore, the trial court abused its discretion by using a 1.5 multiplier and, because

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> court finds that an upward adjustment from the lodestar is appropriate and a multiplier of 1.5 should be applied to all fees through the date of the jury's verdict.

147 Wn. App. at 449.

adjustments are used sparingly, we remand for recalculation of the attorney fee award without an upward adjustment.

Attorney Fees on Appeal

The Ryffels seek attorney fees on appeal under the contract language, RAP 18.1, and RCW 60.04.181(3), which addresses attorney fees in a lien foreclosure action. The contract states, under paragraph 11, "In the event of default and payment is not made within three (3) days, owner will pay all costs of collection including attorney fees" and this language is reciprocal.[15] Ex. 1 at 6; RCW 4.84.330. Under RAP 18.1, attorney fees are recoverable if allowed under statute. Because the Ryffels have prevailed, we award attorney fees on appeal, subject to the Ryffels' compliance with RAP 18.1.

Reversed and remanded for recalculation of the attorney fees awarded at trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

I concur:

Armstrong, J.

[15] RCW 4.84.330 states, in pertinent part,

> In any action on a contract . . . entered into after September 21, 1977, where such contract . . . specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract . . ., shall be awarded to one of the parties, the prevailing party, where he is the party specified in the contract . . . or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Hunt, J. – (concurring in part, dissenting in part) I concur in the majority's ultimate conclusion that the $89,397 attorney fee award is too high in this $24,805 lien foreclosure action, which Hudson's counsel undertook based on an oral contingent fee agreement. But I respectfully dissent from subsections 1 and 2 of the majority's "Lodestar Hourly Rate" analysis. In my view, the trial court did not abuse its discretion in accepting Hudson's counsel's $350 hourly rate as a reasonable lodestar amount.

I. Reasonable Hourly Rate

The majority holds that the trial court abused its discretion in adopting Hudson's counsel's $350 hourly rate to calculate the lodestar amount in the absence of a written contingent fee agreement. I disagree. I would hold that the trial court did not abuse its discretion in adopting this $350 hourly rate.

We review a trial court's determination of what constitutes a reasonable attorney fee award for abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). A trial court does not abuse its discretion unless its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Davis v. Globe Machine Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. *Singleton v. Frost*, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987) (quoting *Wilkinson v. Smith*, 31 Wn. App. 1, 14, 639 P.2d 768 (1982)).

RPC 1.5(a) (2005) lists the factors to be considered in determining the reasonableness of an attorney fee.[16] An attorney's established rate for billing clients will likely be a reasonable rate,

[16] See majority n.6, for full list of RPC 1.5(a) factors.

with a variety of factors permitting (but not mandating) an upward or downward adjustment by the trial court. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

Here, Hudson's counsel submitted to the trial court $350 per hour as his established rate for billing clients. The trial court considered several factors in analyzing the reasonableness of this hourly rate: (1) counsel's 35 years of experience as a litigator, (2) his routine billing of the $350 hourly rate, (3) the long professional relationship between attorney and client, and (4) counsel's past results obtained in Hudson's favor. While $350 per hour may be higher (and possibly lower) than rates charged by some comparable attorneys in the Puget Sound area, it is not so high that we can say that no reasonable person would take the same position. Therefore, I would hold that the trial court did not abuse its discretion in using the $350 per hour rate to calculate the lodestar amount in awarding attorney fees.

II. Excessive Attorney Fee Award

As the majority explains in sections B and C of its opinion, the trial court miscalculated its final award of attorney fees by (1) including an unreasonable number of travel hours for Hudson's counsel, and (2) applying a 1.5 multiplier to the initial lodestar figure. Such additional factors led to an inflated final award that grossly exceeded the amount in controversy. The trial court should have used its discretion to find a reasonable fee award that both made Hudson whole and adequately compensated its counsel for his services, without granting a windfall for both the prevailing party and its attorney. *Mayer v. City of Seattle*, 102 Wn. App. 66, 81, 10 P.3d 408 (2000).

I agree with the majority that the trial court abused its discretion by including travel hours and applying an upward multiplier, and that the appropriate remedy is to remand for recalculation of the attorney fee award without these alterations.

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Hunt, J.